No. 4857

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMPLOYERS' LIABILITY ASSURANCE CORPORATION LIMITED OF LONDON, ENGLAND (a corporation),

Plaintiff in Error,

vs.

PORTLAND ELECTRIC POWER COMPANY (a corporation),

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error respectfully asks for a rehearing of this case. A single consideration will, we think, demonstrate to the court that it has fallen into manifest and material error in the opinion filed herein. The point to which we refer is considered in the first subdivision of the argument which follows. In the subsequent subdivisions other features of the case will be considered, but it is obvious that if the court

has erred in respect to the first point which we make the filed opinion should be withdrawn and further consideration be given to the case.

I.

IF THE VIEWS OF THE COURT ARE CORRECT THE INSURED PAID AN ADDITIONAL PREMIUM BASED ON THE WAGES OF CERTAIN SPECIFIED EMPLOYEES WITHOUT ANY CONSIDERATION THEREFOR. ALL EMPLOYEES UNDER THE VIEWS EXPRESSED BY THE COURT WOULD HAVE BEEN COVERED BY THE TERMS OF THE POLICY REGARDLESS OF THE ENDORSEMENT COVERING SPECIFIED EMPLOYEES FOR WHICH THE INSURED PAID AN ADDITIONAL PREMIUM.

The court holds that the employer having rejected "compensation" was not "under" *the compensation law of Oregon,* and hence that *all* of its employees, whether engaged in hazardous occupations or not, were covered by the terms of the policy.

But inconsistently with this proposition it appears that the employer was charged an additional premium of five cents per hundred dollars of wages paid to its employees engaged in the maintenance, care and upkeep of the building.

Referring to this additional premium the court says that "no doubt this was intended as adequate premium to cover all of plaintiff's employees so engaged or otherwise."

But if (as the court holds) the insured's employees, as well as the public, were covered by the terms of the policy why would the insured *be charged and pay an additional premium for coverage of its employees?*

Why should the insured by an endorsement on the policy seek and pay for coverage of its employees who (as the court holds) *would be covered if such endorsement had not been made?* Why should the insured pay for what it already had? Obviously if the endorsement covering employees were eliminated from the policy the insured would have, under the court's construction of the policy, an equally broad coverage and would be relieved from the payment of an additional premium.

Aside from the considerations which follow this consideration, we respectfully submit, requires the withdrawal of the opinion filed herein. The court has here fallen into clear and unmistakable error.

A construction which involves such a marked incongruity as we have pointed out is necessarily erroneous.

II.

THERE IS NO AMBIGUITY IN THE POLICY BUT THE FORM OF IT IS GENERAL AS IT WAS PREPARED FOR USE IN ALL STATES, SOME OF WHICH HAVE COMPENSATION LAWS AND OTHERS NOT.

In the concluding paragraph of its opinion the court refers to the well-established rule that ambiguities in insurance policies should be resolved in favor of the insured.

But there is no ambiguity in the policy here. In the clearest and most definite terms the policy excludes employees in states where there is a "Compensation Act or Law". There is no ambiguity or uncertainty in this

language. Of course if the policy had been prepared for the plaintiff alone, or for that matter for the State of Oregon alone, it is probable that different language would have been used. But bearing in mind that employers' liability policies are *printed contracts intended for general use throughout the country,* we do not see how the insurer could possibly have better expressed its intent than it did by the language which it employed in this case. It meant to say, and did say, that in states which have compensation laws employees are not covered *unless they are expressly stated to be covered, and liability assumed by the employer for an additional premium based on the remuneration paid to employees.* If the insurer had been making a contract *with the plaintiff only* it would no doubt have provided that the policy covered the public, and such employees of the insured as were engaged in non-hazardous occupations; and also (in consideration of the *additional* premium) such employees as were engaged in the maintenance, care and upkeep of the building. But while such a contract would have been perhaps more pointed and direct, it would not have been any *clearer* or *more definite* than the policy in suit. The difference lies in the fact that the form of the policy used in this case is applicable to all insured persons in whatever state they may be.

It was so phrased as to include *all cases* instead of *one particular case.* It would be most unreasonable, we submit, to require an insurer to abandon the form of policy used by it throughout the United States and oblige it to draw up a *special contract for each person insured.* This would involve a considerable increase

of expense without any material advantage to either the insurer or insured.

It seems incredible that the insured in this case could have supposed, by reason of anything in the policy issued to it, that the policy covered *all* of its employees engaged in hazardous occupations. The policy distinctly specified not that *all,* but that *some only,* of plaintiff's employees were covered; and it *specifically named those who were covered.* And the premium paid was based not on the wages of *all* employees engaged in hazardous occupations *but only on the wages paid to the specified employees.*

Nor could the insured for a moment have entertained the belief that *all* of its employees were covered because it had rejected "compensation". If it had believed this, most certainly *it would not have paid the additional premium on the wages of the specified employees.* It would have taken the policy without any reference therein to such employees because (if the court's construction of the policy be correct) such specified employees and *all other employees* were covered by the terms of the policy. If none of the employees, as the court holds, were "under" the "compensation" law the insured would not have paid an additional premium in order that they or any of them might be included. No sane man would pay a premium to include employees *who already were covered by the terms of his policy.*

III.

THE EMPLOYER AND ITS EMPLOYEES ENGAGED IN HAZARDOUS OCCUPATIONS WERE UNDER THE SO-CALLED "COMPENSATION" LAW OF OREGON.

We find in the opinion of the court no answer to our argument on this point. The court merely says that it "cannot agree" with our "contention".

The cases which the court cites in its opinion are plainly irrelevant. They have no bearing upon the point here involved. They do not hold, nor remotely intimate, that an employer is not under the "compensation" *law* because he is willing to be stripped of his common law defenses rather than pay "compensation."

No such point was involved nor considered in the cases cited by the court in its opinion. In these cases the court was not considering the question whether or not the employer was "under" the "compensation" *law*. It was there pointed out that the employer was not *legally bound to pay "compensation"*—that in lieu thereof he could pay *damages* if he so chose. In other words, he had the right to elect to assume *damage liability* which the statute imposed upon him if he were not willing to accept *compensation liability*. In either case the employer would of course be *"under" the compensation law*. The cited cases give no support whatever to the conclusion reached by the court in this case. On the other hand, we cited a number of cases which, we submit, clearly support our contention that in any event the employer was *"under" the law;* to which cases no reference is made in the court's opinion. These cases are to the effect that whether the em-

ployer elects to pay "compensation" or to pay *damages* he is still *subject to the law.* He is as much "under" the compensation *law* as he is under the law of gravity. Oregon employers can no more "reject" the "compensation" law of that state than they can "reject" the law of gravity. They can of course, if they choose to do so, jump out of the frying pan into the fire; but in either case their position will be such an uncomfortable one that, *without an additional premium,* insurers will not accept the risk.

The purpose of the legislature in enacting the compensation law was to *induce* employers to pay their employers "compensation", but it did not *legally obligate* them to do so. It said to employers, "you must either pay compensation *or take the consequences";* and unless, in the judgment of the legislature, the consequences were more onerous than the payment of compensation the law would not have been passed. It would of course be futile for the legislature to have said to employers: "pay compensation if you want to, but if you prefer you can assume a *less onerous* obligation". Obviously in such case no employer would pay compensation. He pays it because he considers his risk *less if he pays compensation than if he elects not to pay it.* It is because of this fact that the law accomplishes generally what the legislature was seeking to accomplish—the payment of compensation. Here and there an employer, putting his judgment against the judgment of the legislature, as was done by the employer in the case at bar, decides to run the risk attaching to an election not to pay compensation.

From the point of view *of an insurer* it is of course immaterial that the employer has elected not to pay "compensation". The exception in the policy is not aimed at "compensation" but at the so-called "compensation" *law*. The insurer is concerned with the *nature of the risk assumed*. If, as we must presume, the *damage risk* is worse, or at least as bad, as the "compensation" risk, the insurer will of course decline to assume the *damage risk* without the payment of an additional premium, for the same reason that it would decline to accept the *"compensation" risk*. In the case at bar the insured actually paid an additional premium for certain employees specifically covered by the terms of the policy. It is, we submit, preposterous to assume that this additional premium would have been paid by the employer if, as the court holds, the exception in the policy was intended to relate to employees entitled to compensation and not to employees entitled to damages. *None* of the insured's employees were entitled to compensation; they were *all* entitled to damages. Now if there was no objection on the part of the insurer to covering employees entitled to damages why was an *additional charge* made for the included employees, and why did the employer pay such charge? Why charge an additional premium for employees which the policy, as construed by the court, covered without the payment of such additional premium? According to the view entertained by the court the case is the same as if *no compensation law had been enacted in Oregon*. In such case, of course, by the express terms of the policy, employees as well as the public would be covered *without any charge on*

account of employees. The policy covers all "persons" which of course would include employees in states where compensation laws have not been enacted. In such states the risk is less. Compensation laws, whether "optional" or not, impose *additional burdens* on the employer and of course *increase the risk assumed by an insurer.* This is the explanation of the exception in the policy excluding from its operation (without the payment of an additional premium) "any employee of the assured under any Workmen's Compensation Act or Law". As above stated, the policy is a *general form prepared for use in all states.* Where compensation laws have been enacted employers are not covered except by *special agreement endorsed on the policy* and an additional charge made for such coverage as provided in Item 3 of the Declarations, to-wit, a charge based on the remuneration paid the employees the risk as to whom the insurer agrees to assume. The exception relates to conditions existing in the State of Oregon as well as in states where no election is provided for as between "compensation" and damage liability. There *is* in Oregon a "Compensation Act or Law" just as well as in the State of California. The form of policy used in this case is as applicable to exclude employees engaged in hazardous occupations in the State of Oregon, election or no election, as it is to exclude employees in the State of California. The optional feature, *so far as the risk is concerned,* is wholly immaterial.

IV.

THE PREMIUM OF FIVE CENTS PER HUNDRED DOLLARS ON THE WAGES OF THE EMPLOYEES ENGAGED IN THE MAINTENANCE, CARE AND UPKEEP OF THE BUILDING IS THE CONSIDERATION FOR THE INSURANCE WITH RESPECT TO SUCH EMPLOYEES AND TO NO OTHERS.

On this point the court says in its opinion: "it is clear that all of plaintiff's employees are not engaged in the maintenance, care and upkeep of the building, and no doubt this was intended as adequate premium to cover all of plaintiff's employees so engaged or otherwise". But why this should be so the court does not explain. We submit that it is manifestly not so. A premium is of course *adjusted to the risk assumed.* It is a percentage on the wages paid. The more employees, the larger the premium. The aggregate wages paid to the employees engaged in the maintenance, care and upkeep of the building was estimated at only $6000.00 per year. How could this small premium based on the wages paid *some* employees be an "adequate premium" for *all* employees? It was of course not a consideration for employees engaged in non-hazardous occupations because they were covered anyhow. And it is incomprehensible to us how it could be the consideration "to cover all of plaintiff's employees" engaged in hazardous occupations of which there were a very large number. It certainly will not be questioned *that premiums are proportionate to risks.* Now suppose that plaintiff the day following the issuance of the policy engaged a thousand new employees and put them to work in hazardous occupations other than in the maintenance, care and upkeep of the building. Upon what rational theory can it be said that

this small *inelastic* premium was intended to embrace such additional employees? Or suppose that plaintiff *reduced* the number of employees engaged in the maintenance, care and upkeep of the building so that their wages were but $3000.00 instead of $6000.00. Why should the *reduced premium* cover all *other* employees including employees engaged *after the policy was written?* Certainly we have here a manifest and gross incongruity which conclusively demonstrates that the court has fallen into error in holding that "no doubt this was intended as adequate premium to cover all of plaintiff's employees so engaged or otherwise".

But if, as the court says, *"any person or persons"* are covered by the terms of the policy then of course all employees would be covered without the payment of an additional premium based on the wages paid employees. If *employees,* as the court holds, are to be treated as embraced by *"any person or persons"* why should an additional premium be paid for their coverage?

It is plain, we submit, that the provision of the policy relating to the payment of premium based on wages paid employees relates to those cases *where compensation laws are in effect,* and hence where employees would be *excluded* by the exception in the policy unless they are *included* by special endorsement on the policy and an *additional charge made for including them.*

It follows that the provision regarding the payment of a premium based on wages paid employees *can be* "invoked" as evidence against the construction given by the court. This provision *coupled with the actual*

payment of a premium under it conclusively demonstrates that the employees engaged in the maintenance, care and upkeep of the building would not have been covered if they had not been *named in the policy and a premium paid for assuming the risk as to them.*

If the insured desired other employees engaged in hazardous occupations covered it should and would have paid for such coverage a premium *based on the wages paid such other employees.*

Doubtless the reason why the insured did not have such *other employees* covered was that the risk of injury *by the elevator* as to them was somewhat remote, and so the insured rather than pay the premium required for such coverage assumed the risk as to such *other employees* itself. As it is, no consideration as to them was received by the insurer. The insured in this case prayed that it be given something for nothing and its prayer was granted.

For these reasons we most earnestly urge upon the court that it grant a rehearing and rectify the manifest injustice done by the judgment in this case.

Dated, November 29, 1926.

Respectfully submitted,

WILBUR, BECKETT, HOWELL & OPPENHEIMER,
REDMAN & ALEXANDER,
Attorneys for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, November 29, 1926.

L. A. REDMAN,
Of Counsel for Plaintiff in Error and Petitioner.